

“Interacting with Others” as a Major Life Activity Under the Americans with Disabilities Act

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I. INTRODUCTION

On any given day, almost all people come in contact with at least one or two other people, though most of us usually come in contact with many more. This contact occurs in employment settings, social settings, educational settings, and public settings, such as the street or grocery store. This contact that we have with other people can be characterized as “interacting with others” and is part of the inherent nature of humans as social beings.

Interacting with others can involve many abilities, including speaking, seeing, hearing, listening, understanding, walking, communicating, and others. These are all abilities that most people can perform to some extent, and that most people take for granted. Although some people may be better at these abilities than other people, one’s skill or desire (as opposed to capability) in performing any of these abilities does not affect the fact that it is being performed or, in the context of contact with others, the fact that the person is interacting with others.

Most of the abilities listed above are considered “major life activities” under the Americans with Disabilities Act.¹ Nonetheless, there is no judicial consensus on whether “interacting with others” itself is a major life activity. Three circuits – the First, Ninth, and Second – have addressed the issue of whether interacting with others is a major life

¹ See *infra* Part II.B.2. For further discussion on major life activities see Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999); Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997 (2004); Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217 (2004); Ann Hubbard, *The Myth of Independence and the Major Life Activity of Caring*, 8 J. GENDER RACE & JUST. 327 (2004); Heidi R. Youngs, *Reproduction as a Major Life Activity Under the ADA: A Survey of the Law Beginning with the Eighth Circuit*, 31 CREIGHTON L. REV. 455 (1998); Kiren Dosanjh Zucker, *The Meaning of Life: Defining “Major Life Activities” Under the Americans with Disabilities Act*, 86 MARQ. L. REV. 957 (2003); Timothy D. Johnston, *Reproduction Is Not a Major Life Activity: Implications for HIV Infection as a Per Se Disability Under the Americans with Disabilities Act*, 85 CORNELL L. REV. 189 (1999); Carolee Kvorciak Lezuch, Note, *The Americans with Disabilities Act: Redefining “Major Life Activity” to Protect the Mentally Disabled*, 44 WAYNE L. REV. 1839 (1999); Daniel A. McMillan, Note, *Playing with Work: Must “Work” Be Treated as a “Major Life Activity” for Purposes of the Americans with Disabilities Act?*, 31 FORDHAM URB. L.J. 1333 (2004); Sarah Lynn Oquist, Casenote, *Reproduction Constitutes a “Major Life Activity” Under the ADA: Implications of the Supreme Court’s Decision in Bragdon v. Abbott*, 32 CREIGHTON L. REV. 1357 (1999); Melissa S. Wandersee, Comment, *The Far-Reaching Effects of Reproduction as a “Major Life Activity” Under the ADA: What Will This Expansion Mean to Employers and Their Insured?*, 3 J. SMALL & EMERGING BUS. L. 429 (1999).

activity.² The First Circuit has said that it is not, while the Ninth and Second Circuits have said that it is.³

This article argues that interacting with others is a major life activity. Part II discusses the background of the Americans with Disabilities Act, including its purpose and coverage, as well as how “disability” is defined by the Act and judicial interpretation of the Act.⁴ Part III presents the circuit split on the issue and describes each of the three circuit court decisions that have addressed the issue of whether interacting with others is a major life activity.⁵ Part IV explains why the Ninth and Second Circuits are correct in finding that “interacting with others” is a “major life activity.”⁶ They are correct because the activity of interacting with others falls within the Supreme Court’s definition of “major” and it is similar to other activities that are major life activities.⁷ Part IV also discusses what the possible tests are for determining when the major life activity of interacting with others is “substantially limited,”⁸ and argues that the Second Circuit’s test is correct because it addresses one’s ability to communicate with others, which is a fundamental aspect of “interacting with others.”⁹ Part V concludes this article.¹⁰

II. BACKGROUND

A. Americans with Disabilities Act

1. Rationale and Purpose of the Act

On July 26, 1990, President George H. W. Bush signed the Americans with Disabilities Act (“ADA”) into law.¹¹ It was the world’s

² See *infra* Part III.

³ See *infra* Part III. For further discussion on whether “interacting with others” is a major life activity, see Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139 (2002); Mark DeLoach, Note, *Can’t We All Just Get Along?: The Treatment of “Interacting with Others” as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313 (2004); Bryan P. Stephenson, Comment, *I’m So Lonesome I Could Cry . . . But Could I Sue?: Whether “Interacting with Others” Is a Major Life Activity Under the ADA*, 31 PEPP. L. REV. 773 (2004).

⁴ See *infra* Part III.

⁵ See *infra* Part III.

⁶ See *infra* Part IV.

⁷ See *infra* Part IV.A.

⁸ See *infra* Part IV.B.1.

⁹ See *infra* Part IV.B.2.

¹⁰ See *infra* Part V.

¹¹ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C.A. §§ 12101-12213, 47 U.S.C.A. §§ 152, 221, 225,

first comprehensive piece of legislation designed to give equal rights to people with disabilities¹² and was the culmination of a decades-long campaign by advocates of rights for the disabled.¹³ The ADA was well received and enjoyed enormous public support.¹⁴

Congress passed the ADA in response to “the continuing existence of unfair and unnecessary discrimination and prejudice” against people with disabilities.¹⁵ There may have also been some interest to give disabled persons protection since the Supreme Court ruled in 1985 that disabled persons were not a quasi-suspect class under the Equal Protection Clause, meaning legislation directed at them would not receive heightened scrutiny.¹⁶ At the time of the ADA’s enactment there were around forty-three million people living in the United States with one or more physical or mental disabilities.¹⁷ At the time of the 2000 census, there were roughly fifty million Americans over the age of five who were considered disabled.¹⁸

In the past, people with disabilities tended to be isolated and segregated from society.¹⁹ Such forms of discrimination continue today and are a “serious and pervasive social problem.”²⁰ Discrimination against disabled persons is generally the result of societal “stereotypes,

611, 711, and 29 U.S.C.A. § 706 (West 2005)). When President Bush signed the ADA he made some remarks, including the following:

This act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights. It will guarantee fair and just access to the fruits of American life which we all must be able to enjoy.

President George H. W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), <http://bushlibrary.tamu.edu/research/papers/1990/90072600.html> (last visited Oct. 17, 2005).

¹² President George H. W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), <http://bushlibrary.tamu.edu/research/papers/1990/90072600.html> (last visited Oct. 17, 2005).

¹³ Kevin L. Cope, Comment, *Sutton Misconstrued: Why the ADA Should Now Permit Employers to Make Their Employees Disabled*, 98 NW. U. L. REV. 1753, 1758 (2004).

¹⁴ *Id.*

¹⁵ ADA § 2(a)(9), 42 U.S.C.A. § 12101(a)(9).

¹⁶ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

¹⁷ ADA § 2(a)(1), 42 U.S.C.A. § 12101(a)(1).

¹⁸ See U.S. Census Bureau, Census 2000 Quick Table P21, Disability Status of the Civilian Noninstitutional Population (2000), http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF3_U_QTP21&-ds_name=DEC_2000_SF3_U&-lang=en&-sse=on (note that this table only counted those individuals not living in institutions) (last visited Oct. 17, 2005).

¹⁹ ADA § 2(a)(2), 42 U.S.C.A. § 12101(a)(2).

²⁰ *Id.*

discomfort, misconceptions, and unfounded fears” that are not representative of the abilities of such persons to participate in and contribute to society.²¹

In passing the Act, Congress pointed out that discrimination against people with disabilities occurs in many different areas including “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”²² Congress also recognized that intentional exclusion is not the only type of discrimination suffered by disabled persons, but that the way buildings, transportation systems, and communications systems are designed also have a discriminatory effect on the disabled.²³ Until the ADA was enacted, disabled persons were even more disadvantaged from a legal standpoint than individuals who suffered discrimination on the basis of their “race, color, sex, national origin, religion, or age” because, unlike these other individuals, disabled persons “often had no legal recourse to” remedy such discrimination.²⁴

Congress specifically stated four purposes of the ADA. First, the Act was meant to provide a thorough and understandable directive for the elimination of discrimination against disabled persons.²⁵ Second, it was meant to provide standards for addressing discrimination based on disability that are “clear, strong, consistent, [and] enforceable.”²⁶ Third, it was meant to make sure that the Federal Government “plays a central role in enforcing the standards established by [the Act] on behalf of individuals with disabilities.”²⁷ Finally, the Act was meant to bring the force of congressional authority into play, especially Congress’ power to enforce the Fourteenth Amendment and the interstate commerce power, enabling the major areas of discrimination against disabled persons to be addressed.²⁸ Congress also stated that the proper goals with regard to people with disabilities are “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”²⁹

²¹ D. Aaron Lacy, *Am I My Brother’s Keeper: Disabilities, Paternalism, and Threats to Self*, 44 SANTA CLARA L. REV. 55, 67 (2003). See also ADA § 2(a)(7), 42 U.S.C.A. § 12101(a)(7).

²² ADA § 2(a)(3), 42 U.S.C.A. § 12101(a)(3).

²³ *Id.* § 2(a)(5), 42 U.S.C.A. § 12101(a)(5).

²⁴ *Id.* § 2(a)(4), 42 U.S.C.A. § 12101(a)(4).

²⁵ *Id.* § 2(b)(1), 42 U.S.C.A. § 12101(b)(1).

²⁶ *Id.* § 2(b)(2), 42 U.S.C.A. § 12101(b)(2).

²⁷ *Id.* § 2(b)(3), 42 U.S.C.A. § 12101(b)(3).

²⁸ *Id.* § 2(b)(4), 42 U.S.C.A. § 12101(b)(4).

²⁹ *Id.* § 2(a)(8), 42 U.S.C.A. § 12101(a)(8).

2. Coverage of the Act

The ADA is divided into five titles.³⁰ Title I addresses discrimination against disabled persons in employment situations.³¹ Title II addresses discrimination in public services, including the acts of public entities and the availability of public transportation.³² Title III addresses public accommodations and services operated by private entities.³³ Title IV addresses the discriminatory effect of telecommunications systems on the hearing or speech-impaired, including public service announcements.³⁴ Title V contains miscellaneous provisions.³⁵

The ADA applies to private employers with 15 or more employees,³⁶ labor organizations, joint labor-management committees, employment agencies,³⁷ state and local governments or entities thereof,³⁸ and private entities that operate public accommodations and services.³⁹ The ADA does not apply to the federal government,⁴⁰ except for those employed by the U.S. Senate, the House of Representatives, and other Congressional entities (e.g. Library of Congress),⁴¹ Indian tribes, or bona fide private membership clubs.⁴²

Different entities have the authority to issue regulations implementing different parts of the ADA. The Equal Employment Opportunity Commission ("EEOC") has the authority⁴³ to promulgate regulations dealing with Title I,⁴⁴ which contains the employment provisions of the ADA. The Attorney General has the authority⁴⁵ to promulgate regulations implementing Title II, Subtitle A,⁴⁶ which contains the provisions relating to public services, and the authority⁴⁷ to

³⁰ *Id.* § 1, 42 U.S.C.A. § 12101 Note.

³¹ *Id.* §§ 101-108, 42 U.S.C.A. §§ 12111-12117.

³² *Id.* §§ 201-246, 42 U.S.C.A. §§ 12131-12165.

³³ *Id.* §§ 301-310, 42 U.S.C.A. §§ 12181-12189.

³⁴ ADA §§ 401, 402, 47 U.S.C.A. §§ 152, 221, 225, 611(West 2005) (amending the Communications Act of 1934).

³⁵ *Id.* §§ 501-514, 42 U.S.C.A. §§ 12202-12213.

³⁶ *Id.* § 101(5)(A), 42 U.S.C.A. § 12111(5)(A).

³⁷ *Id.* § 101(2), 42 U.S.C.A. § 12111(2).

³⁸ *Id.* § 201(1), 42 U.S.C.A. § 12131(1).

³⁹ *Id.* § 301(6)-(7), 42 U.S.C.A. § 12181(6)-(7).

⁴⁰ *Id.* § 101(5)(B), 42 U.S.C.A. § 12111(5)(B).

⁴¹ JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 793-94 n.b (5th ed. 2001).

⁴² ADA § 101(5)(B)(i)-(ii), 42 U.S.C.A. § 12111(5)(B)(i)-(ii).

⁴³ *Id.* § 106, 42 U.S.C.A. § 12116.

⁴⁴ *Id.* §§ 101-108, 42 U.S.C.A. §§ 12111-12117.

⁴⁵ *Id.* § 204, 42 U.S.C.A. § 12134.

⁴⁶ *Id.* §§ 201-205, 42 U.S.C.A. §§ 12131-12134.

⁴⁷ *Id.* § 306(b), 42 U.S.C.A. § 12186(b).

promulgate such regulations for Title III,⁴⁸ excluding the transportation provisions.⁴⁹ The Secretary of Transportation has the authority⁵⁰ to promulgate regulations implementing Title II, Subtitle B,⁵¹ which contains provisions dealing with public transportation, and the authority⁵² to promulgate such regulations for the transportation provisions of Title III.⁵³ The Federal Communications Commission has the authority⁵⁴ to promulgate regulations implementing Title IV,⁵⁵ which contains the provisions dealing with telecommunications and public service announcements. Also, the Architectural and Transportation Barriers Compliance Board is granted authority to “issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design” with regard to Title II and Title III.⁵⁶

In addition to the responsibility of promulgating regulations in their respective areas, each federal entity is charged with “render[ing] technical assistance to individuals and institutions that have rights or duties under the respective title or titles for which such agency has responsibility.”⁵⁷ The duty of implementing a plan for such assistance is divided up by Title.⁵⁸ For Title I, the EEOC and the Attorney General are charged with implementing the plan for assistance.⁵⁹ The Attorney General must also implement the plan for assistance for Title II, Subtitle A.⁶⁰ For Title II, Subtitle B, the Secretary of Transportation must implement the plan of assistance.⁶¹ For Title III, the Attorney General must coordinate with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board to implement the plan.⁶² Finally, the Chairman of the Federal Communications

⁴⁸ *Id.* §§ 301-310, 42 U.S.C.A. §§ 12181-12189.

⁴⁹ *Id.* §§ 302(b)(2)(B)-(C), 304 (other than (b)(4)), 42 U.S.C.A. §§ 12182(b)(2)(B)-(C), 12184 (other than (b)(4)).

⁵⁰ *Id.* §§ 223, 229, 244, 42 U.S.C.A. §§ 12143(b), 12149, 12164.

⁵¹ *Id.* §§ 221-246, 42 U.S.C.A. §§ 12141-12165.

⁵² *Id.* § 306(a)(1), 42 U.S.C.A. § 12186(a)(1).

⁵³ *Id.* §§ 302(b)(2)(B)-(C), 304 (other than (b)(4)), 42 U.S.C.A. §§ 12182(b)(2)(B)-(C), 12184 (other than (b)(4)).

⁵⁴ *Id.* § 401(a), 47 U.S.C.A. § 225(d)(1).

⁵⁵ *Id.* §§ 401, 402, 47 U.S.C.A. § 152, 221, 225, 611.

⁵⁶ *Id.* § 504, 42 U.S.C.A. § 12204.

⁵⁷ *Id.* § 506(c)(1), 42 U.S.C.A. § 12206(c)(1).

⁵⁸ *Id.* § 506(c)(2), 42 U.S.C.A. § 12206(c)(2).

⁵⁹ *Id.* § 506(c)(2)(A), 42 U.S.C.A. § 12206(c)(2)(A).

⁶⁰ *Id.* § 506(c)(2)(B)(i), 42 U.S.C.A. § 12206(c)(2)(B)(i).

⁶¹ *Id.* § 506(c)(2)(B)(ii), 42 U.S.C.A. § 12206(c)(2)(B)(ii).

⁶² *Id.* § 506(c)(2)(C), 42 U.S.C.A. § 12206(c)(2)(C).

Commission must coordinate with the Attorney General to implement the plan for Title IV.⁶³

Even with all this delegation of authority, the Supreme Court has noted that “[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term ‘disability.’”⁶⁴ The Court, however, used the EEOC’s regulations on the definition of “disability” in its analysis.⁶⁵ The Court declined to decide what deference was due these regulations.⁶⁶

This article focuses on the definition of disability found in the preliminary sections of the Act.⁶⁷ This definition will be examined and discussed in the following section.⁶⁸

B. Disability Defined

The ADA states that “[t]he term ‘disability’ means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”⁶⁹ Although much of the focus of this paper will be on what is considered to be a major life activity, the other elements of the definition will be discussed so that “major life activity” can be placed within the framework of “disability.” The determination of disability is made on an individualized basis.⁷⁰

1. Physical or Mental Impairment

Impairment is the first element that must be met for an individual to be considered disabled.⁷¹ The ADA does not contain a list of impairments that would qualify.⁷² Therefore, courts have taken an individualized approach to determining whether something should be

⁶³ *Id.* § 506(c)(2)(D), 42 U.S.C.A. § 12206(c)(2)(D).

⁶⁴ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (citation omitted); *see* ADA §§ 1-3, 42 U.S.C.A. §§ 12101-12102; *see also id.* § 3(2), 42 U.S.C.A. § 12102(2) (defining disability).

⁶⁵ *Sutton*, 527 U.S. at 480.

⁶⁶ *Id.*

⁶⁷ ADA § 3, 42 U.S.C.A. § 12102.

⁶⁸ *See infra* Part II.B.

⁶⁹ ADA § 3(2), 42 U.S.C.A. § 12102(2).

⁷⁰ *Id.*; *see Sutton*, 527 U.S. at 483; *Bragdon v. Abbott*, 524 U.S. 624, 657 (1997) (Rehnquist, C.J., concurring in part and dissenting in part); *see also infra* notes 73, 124 and accompanying text.

⁷¹ ADA § 3(2), 42 U.S.C.A. § 12102(2).

⁷² FRIEDMAN & STRICKLER, *supra* note 41, at 802.

considered an impairment under the ADA.⁷³ This determination is guided by interpretive regulations issued by several federal agencies that have been assigned by Congress to administer and enforce the ADA.⁷⁴ One such regulation issued by the EEOC provides that a physical impairment includes:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁷⁵

Conversely, the ADA specifically excludes certain conditions from the definition of disability. These conditions include the current use of illegal drugs,⁷⁶ transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.⁷⁷ With regard to an individual’s illegal drug use, that individual’s condition is not excluded from the definition of “disability” if he or she:

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- (3) is erroneously regarded as engaging in such use, but is not engaging in such use⁷⁸

⁷³ *Id.* This makes sense considering that disability as a whole must be determined on an individualized basis. See *supra* note 70 and accompanying text.

⁷⁴ FRIEDMAN & STRICKLER, *supra* note 41, at 802.

⁷⁵ 29 C.F.R. § 1630.2(h) (2005).

⁷⁶ ADA §§ 104(a), 510(a), 42 U.S.C.A. §§ 12114(a), 12210(a).

⁷⁷ *Id.* § 511(b)(1)-(3), 42 U.S.C.A. § 12211(b)(1)-(3).

⁷⁸ *Id.* § 104(b), 42 U.S.C.A. § 12114(b). Current drug use is not a disability, but because past drug use can be a disability, it is critical to determine when the employee was using drugs. See FRIEDMAN & STRICKLER, *supra* note 41, at 803.

However, it is not a violation of the ADA for an employer “to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.”⁷⁹

A condition need not be permanent in order to be covered by the ADA. “[A]lthough ‘temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities,’ an impairment does not have to be permanent to rise to the level of a statutory disability.”⁸⁰

Determining whether there is an impairment is the first step in determining whether an individual is “disabled.” The next step is to determine whether one of the individual’s major life activities is limited by the impairment.

2. Major Life Activity

As mentioned above, this article will focus on the meaning of “major life activity.” The ADA does not list what is included in the definition of major life activity. The EEOC has provided guidance by stating that major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁸¹ The Supreme Court has also added procreation to this list.⁸² Several circuits have added other activities to the list⁸³ such as eating,⁸⁴ sleeping,⁸⁵ and sexual relations.⁸⁶ One circuit has said that bowling, camping, restoring cars, and mowing the lawn are not major life activities.⁸⁷ The EEOC has provided further guidance in the appendix to its regulations relating to the ADA, stating that “[m]ajor life activities’ are those basic activities that the average person in the

⁷⁹ ADA § 104(b), 42 U.S.C.A. § 12114(b).

⁸⁰ FRIEDMAN & STRICKLER, *supra* note 41, at 803 (quoting the EEOC Interpretive and Compliance Manuals); *see also* Aldrich v. Boeing Co., 146 F.3d 1265 (10th Cir. 1998) (adopting the EEOC’s position), *cert. denied*, 526 U.S. 1144 (1999).

⁸¹ 29 C.F.R. § 1630.2(i) (2005).

⁸² Bragdon v. Abbot, 524 U.S. 624, 638 (1997).

⁸³ For a discussion on judicial responses to efforts to expand the list of major life activities, including (1) the physical activities of eating, sleeping, controlling bodily waste, running, exercise, and sports; physical agility and sexual relations; (2) the mental activities of concentration and thinking, awareness, and memory; (3) interpersonal activities; (4) the educational activities of education and test-taking; and reading; (5) transportation activities; and (6) miscellaneous activities, see Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of “Major Life Activity” in the Americans with Disabilities Act*, 33 TEX. TECH. L. REV. 321, 340-65 (2002).

⁸⁴ Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001).

⁸⁵ McAlindin v. San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999).

⁸⁶ *Id.*

⁸⁷ Moore v. J.B. Hunt Transp., Inc. 221 F.3d 944, 951 (7th Cir. 2000).

general population can perform with little or no difficulty.”⁸⁸ The appendix also noted that the list of examples listed in the actual regulation⁸⁹ is not exhaustive and “other major life activities include, but are not limited to, sitting, standing, lifting, reaching.”⁹⁰

The Supreme Court has provided some guidance on how to define “major.” In *Bragdon v. Abbott*,⁹¹ the Court considered whether the plaintiff was substantially limited in the major life activity of reproduction because she was HIV positive.⁹² In determining that reproduction is a major life activity, the Court stated that “the plain meaning of the word ‘major’ denotes comparative importance and suggests that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.”⁹³ Chief Justice Rehnquist, in his concurrence in part and dissent in part, disagreed.⁹⁴ He said that the majority ignored the “alternative definition of ‘major’ as ‘greater in quantity, number, or extent.’”⁹⁵ This is the definition that he thought was most consistent with the ADA’s example list of major life activities.⁹⁶ He based this conclusion on his observation that “the common thread” linking the activities listed in the EEOC regulation is that they “are repetitively performed and essential in the day-to-day existence of a normally functioning individual.”⁹⁷ Justice O’Connor, concurring in part and dissenting in part, agreed with Chief Justice Rehnquist and stated:

the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons – “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” – listed in regulations relevant to the Americans with Disabilities Act of 1990.⁹⁸

In *Bragdon*, the defendant claimed that Congress intended the ADA to cover only activities that had a “public, economic, or daily

⁸⁸ 29 C.F.R. app. § 1630.2(i) (2005).

⁸⁹ See *id.*; see also *supra* note 81 and accompanying text.

⁹⁰ 29 C.F.R. app. § 1630.2(i).

⁹¹ 524 U.S. 624 (1998).

⁹² *Id.* at 628.

⁹³ *Id.* at 638 (internal quotation marks omitted) (quoting *Bragdon v. Abbott*, 107 F.3d 934, 939-940 (1st Cir. 1997)).

⁹⁴ *Id.* at 659-60 (Rehnquist, C.J., concurring in part and dissenting in part).

⁹⁵ *Id.* at 660.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 664-65. (O’Connor, J., concurring in part and dissenting in part).

character.”⁹⁹ The Court, however, rejected this argument stating that “[n]othing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’”¹⁰⁰

Another case in which the Court commented on the meaning of “major” was *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.¹⁰¹ In that case the Court characterized “major” by combining its definition from *Bragdon* with the definition that Chief Justice Rehnquist and Justice O’Connor advocated in their separate opinions in *Bragdon*.¹⁰² Justice O’Connor wrote the opinion for the Court in *Toyota*.¹⁰³ The Court stated that the term “[m]ajor” in the phrase ‘major life activities’ means important.”¹⁰⁴ “Major life activity,” thus, refers to those activities that are of central importance to daily life.”¹⁰⁵ The Court further noted that “[i]f each of the tasks included in the major life activity [in question] does not independently qualify as a major life activity, then together they must do so.”¹⁰⁶

Determining what activities are “major” for purposes of “major life activity” is an important step in determining whether an individual is disabled under the ADA. The fact that there is not an absolute bright-line standard can be a benefit to plaintiffs because it allows them the opportunity to argue that a certain activity should be considered a major life activity.

3. Substantial Limitation

Once it is determined that there is a major life activity involved, the next step is to determine whether that major life activity is substantially limited. Like “major life activity,” the ADA does not define “substantially limits.”¹⁰⁷ The EEOC has defined “substantially limits” to mean

- (i) Unable to perform a major life activity that the average person in the general population can perform; or

⁹⁹ *Id.* at 638 (majority opinion).

¹⁰⁰ *Id.*

¹⁰¹ 534 U.S. 184 (2002).

¹⁰² See *supra* notes 95-98 and accompanying text.

¹⁰³ *Toyota*, 534 U.S. at 187.

¹⁰⁴ *Id.* at 197 (citing WEBSTER’S THIRD NEW WORLD DICTIONARY 1363 (1976)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999).

- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.¹⁰⁸

The EEOC provides a list of factors that should be considered in determining whether an individual is substantially limited in a major life activity.¹⁰⁹ This list includes “[t]he nature and severity of the impairment, . . . [t]he duration or expected duration of the impairment, and . . . [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”¹¹⁰ In the interpretive appendix to its regulations on the ADA, the EEOC provides that “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.”¹¹¹ Examples of impairments that fall into this category “may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.”¹¹²

The EEOC regulations also specifically address the major life activity of working.¹¹³ With regard to working, substantially limits means “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”¹¹⁴ However, “the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”¹¹⁵ There are also some separate factors to consider, in addition to the general factors listed above, when determining if the activity of working is substantially limited.¹¹⁶ These factors include:

- (A) The geographical area to which the individual has reasonable access;
- (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within

¹⁰⁸ 29 C.F.R. § 1630.2(j)(1) (2005).

¹⁰⁹ *Id.* § 1630.2(j)(2).

¹¹⁰ *Id.*

¹¹¹ 29 C.F.R. app. § 1630.2(j) (2005).

¹¹² *Id.*

¹¹³ 29 C.F.R. § 1630.2(j)(3) (2005).

¹¹⁴ *Id.* § 1630.2(j)(3)(i).

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 1630.2(j)(3)(ii).

that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).¹¹⁷

The Supreme Court has provided some guidance on the issue of “substantial limitation.” It is not necessary that plaintiffs show that they cannot perform the major life activity at all, because the ADA “addresses substantial limitations on major life activities, not utter inabilities.”¹¹⁸ Thus, when the impairment significantly limits the major life activity, the definition is satisfied, even if there is not a complete or total limitation.¹¹⁹ However, plaintiffs must show that their activities are in fact substantially limited.¹²⁰ The Court has stated that “‘substantially’ suggests ‘considerable’ or ‘specified to a large degree.’”¹²¹ Therefore, a “mere difference” in how that activity is performed does not amount to a “significant restriction.”¹²² The Court has also stated that “[t]he word ‘substantial’ . . . clearly precludes impairments that interfere in only a minor way with the performance of [a major life activity] from qualifying as disabilities.”¹²³ When proving that the limitation is substantial, plaintiffs must prove that the degree of the limitation caused by their impairment is substantial in terms of their own personal experience.¹²⁴ Thus, substantiality must be determined on a case-by-case basis.

Much of the Court’s guidance in this area has been in the context of the major life activity of working.¹²⁵ With regard to the major life

¹¹⁷ *Id.*

¹¹⁸ *Bragdon v. Abbott*, 524 U.S. 624, 641 (1997).

¹¹⁹ *Id.*

¹²⁰ *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999).

¹²¹ *Sutton v. United Air Lines, Inc.* 527 U.S. 471, 491 (1999) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)); *see also* *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184, 196 (2002).

¹²² *Albertson’s*, 527 U.S. at 565.

¹²³ *Toyota*, 534 U.S. at 197.

¹²⁴ *Id.* at 198 (quoting *Albertson’s*, 527 U.S. at 567).

¹²⁵ *See Sutton*, 527 U.S. 471 (1999) (rejecting myopia as a substantial limitation on the major life activity of working); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (rejecting high blood pressure as a substantial limitation on the major life activity of working); *Albertson’s*, 527 U.S. 555 (1999) (rejecting monocular vision as a substantial limitation on the major life activity of working, but noting that a monocular

activity of working, the Court said that to show substantial limitation plaintiffs must allege that they are “unable to work in a broad class of jobs,”¹²⁶ not just “one type of job, a specialized job, or a particular job of choice.”¹²⁷ The Court further noted that if there are jobs available that utilize an individual’s skills, though not necessarily the individual’s unique talents, then the individual is not precluded from working in a broad class of jobs.¹²⁸

After the passage of the ADA, there was division among the circuit courts on whether an individual’s impairment should be considered in its natural state or as affected by mitigating or correcting factors, such as glasses or contacts, medication, or prosthetic devices, when determining if the condition substantially limits a major life activity.¹²⁹ The Supreme Court resolved the issue in *Sutton v. United Air Lines, Inc.*¹³⁰ The Court stated that when it considered the ADA as a whole it was clear that “if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled’ under the Act.”¹³¹ The ADA requires a present substantial limitation of a major life activity for a disability to exist, not a possible or hypothetical substantial limitation.¹³² The Court reasoned that if an individual corrects his or her condition, though he or she is still impaired, there is no impairment that presently substantially limits a major life activity.¹³³ The Court also concluded that to evaluate persons in their uncorrected or unmitigated state is in direct opposition of the ADA’s mandate to do an individualized inquiry.¹³⁴ In another case, decided on the same day as *Sutton*, the Court extended this rule to cover cases where the mitigation measures are undertaken, “whether consciously or not, within the body’s own systems.”¹³⁵

individual might be able to show a substantial limitation on the major life activity of seeing).

¹²⁶ *Sutton*, 527 U.S. at 491.

¹²⁷ *Id.* at 492.

¹²⁸ *Id.*

¹²⁹ FRIEDMAN & STRICKLER, *supra* note 41, at 806.

¹³⁰ 527 U.S. 471 (1999).

¹³¹ *Id.* at 482.

¹³² *Id.*

¹³³ *Id.* at 482-83.

¹³⁴ *Id.* at 483.

¹³⁵ *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999) (holding that the plaintiff’s subconscious ability to compensate for his visual impairment should be taken into consideration when determining whether he was substantially limited in a major life activity).

Even if a plaintiff establishes that his or her impairment affects a major life activity, the substantial limitation requirement can be a significant hurdle to overcome. However, once this final element is met, an individual will be considered “disabled” for purposes of the ADA.

4. The “Record Of” and “Regarded As” Prongs of the “Disability” Definition

As the definition of “disability” makes clear, the ADA applies to individuals for whom there is a record of the individual’s impairment and for individuals who are regarded as having an impairment.¹³⁶ The inclusion of the “record of” and “regarded as” prongs of the definition of disability shows that Congress was aware that the perception of disability can lead to discrimination against individuals even if they are not currently disabled.¹³⁷

The EEOC has defined “record of such impairment” to mean “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”¹³⁸ Courts have agreed that the requirement of a substantial limitation on a major life activity also applies to an individual bringing a claim based on having a record of impairment.¹³⁹

The EEOC has defined “regarded as having such impairment” to mean

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined in . . . this section but is treated by a covered entity as having a substantially limiting impairment.¹⁴⁰

¹³⁶ ADA § 3(2), 42 U.S.C.A. § 12102(2) (West 2005).

¹³⁷ Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CAL. L. REV. 1981, 1993 (2002).

¹³⁸ 29 C.F.R. § 1630.2(k) (2005).

¹³⁹ See, e.g., *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1120 (5th Cir. 1998) and *Burch v. Coca-Cola Co.*, 119 F.3d 305, 321 (5th Cir. 1997).

¹⁴⁰ 29 C.F.R. § 1630.2(l) (2005).

The Supreme Court also has provided some guidance on the issue. The Court has stated that there are two ways in which individuals will fall within the scope of the “regarded as” definition of disability:¹⁴¹ first, if “a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities;” or, second, if “a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.”¹⁴² An example of the first case would be if an employer mistakenly believes that a person is hearing impaired, when the person in fact is not, and the employer treats the person differently because of this mistaken belief. An example of the second case would be if an employer knows that a person has dyslexia and thinks that this substantially limits the person’s ability to do his or her job, when in fact it is not a substantial limitation, and the employer treats the person differently because of this belief. “In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.”¹⁴³ The Court summed up by stating that “[a]n employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity.”¹⁴⁴

III. CIRCUIT SPLIT

To date, only three circuits have decided the issue of whether “interacting with others” is considered a “major life activity” under the Americans with Disabilities Act.¹⁴⁵ All other circuits that have been faced with the issue have declined to decide it one way or the other.¹⁴⁶

¹⁴¹ Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 490.

¹⁴⁵ See Jacques v. DiMarzio, Inc., 386 F.3d 192, 202-03 (2d Cir. 2004) (holding that getting along with others is not a major life activity under the ADA, but that interacting with others is a major life activity); McAlindin v. County of San Diego, 192 F.3d 1226, 1234-35 (9th Cir. 1999) (holding that interacting with others is a major life activity under the ADA); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (holding that getting along with others is not a major life activity under the ADA).

¹⁴⁶ See Rohan v. Networks Presentations LLC, 375 F.3d 266, 274 (4th Cir. 2004) (noting that it had previously expressed doubt about the assertion that interacting with others is a major life activity and stating “[w]e decline to resolve this issue here because, assuming that interacting with others is a major life activity, [plaintiff] has not demonstrated that it is an activity in which she is substantially limited”); Heisler v. Metro. Council, 339 F.3d 622, 628-29 (8th Cir. 2003) (assuming for purposes of the case that interacting with others is a major life activity, but stating that “[r]egardless of

The First Circuit has decided that “getting along with others” is *not* a major life activity under the ADA.¹⁴⁷ The Ninth Circuit has decided that “interacting with others” *is* a major life activity under the ADA.¹⁴⁸ The Second Circuit has held that “getting along with others” is *not* a major life activity, but that “interacting with others” *is* a major life activity.¹⁴⁹

A. The Not a Major Life Activity Approach

As stated above, the First Circuit has found that “interacting with others” is not a major life activity.¹⁵⁰ In *Soileau v. Guilford of Maine, Inc.*,¹⁵¹ Randall Soileau sued his former employer, Guilford of Maine (“Guilford”), for wrongful termination claiming he was discriminated against on the basis of his disability.¹⁵² Soileau worked for Guilford in various capacities from 1979 to 1994.¹⁵³ In 1992, Soileau began working for a new supervisor, Matt Earnest, who thought that Soileau’s performance was not up to par and that he had a negative attitude.¹⁵⁴ At Earnest’s instruction, Soileau surveyed his co-workers’ opinions of his performance.¹⁵⁵ Earnest then asked him to draft a plan to deal with the weak areas identified in the survey, but Soileau refused to do this because he did not think that the survey showed any weak areas.¹⁵⁶ Soileau also refused to train a co-worker after Earnest instructed him to do so and a dispute arose between them.¹⁵⁷ Earnest issued Soileau a “Final Written Warning/Suspension” on March 23, 1994, and Soileau was suspended for two days to evaluate his own performance and draft

whether we treat interacting with others as a separate major life activity or a subset of the broader activities of learning or working, [plaintiff] has similarly failed to provide sufficient evidence that her major depressive disorder has substantially limited her ability to interact with others . . . ”); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 337 (6th Cir. 2002) (noting “that it has been held that ‘interacting with others,’ is a major life activity” but failing to decide the issue); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (declining to address whether interacting with others is a major life activity because plaintiff would not be able to establish a substantial limitation even if it were a major life activity); *see also* *Emerson v. N. States Power Co.*, 256 F.3d 506, 511 (7th Cir. 2001) (describing “interacting with others” as one of “many activities that feed into the major life activities of learning and working”).

¹⁴⁷ *Soileau*, 105 F.3d at 15.

¹⁴⁸ *McAlindin*, 192 F.3d at 1234-35.

¹⁴⁹ *Jacques*, 386 F.3d at 202-03.

¹⁵⁰ *See Soileau*, 105 F.3d 12.

¹⁵¹ *Id.* at 15.

¹⁵² *Id.* at 13.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

an improvement plan.¹⁵⁸ Upon returning to work he began a four-week monitoring period.¹⁵⁹ Soileau, stressed because of the warning, saw a psychologist, Dr. Dannel Starbird.¹⁶⁰ Dr. Starbird had previously diagnosed Soileau with a chronic depressive disorder known as dysthymia, which is a disorder that is “characterized by intermittent bouts of depression.”¹⁶¹ Dr. Starbird determined that Soileau was suffering from one of these bouts of depression.¹⁶² Earnest accommodated Soileau’s condition by relieving him of his responsibilities that involved significant interaction with other people.¹⁶³ At the end of the four-week monitoring period Soileau had not shown any improvement in the problem areas, nor had he submitted his plan for improvement.¹⁶⁴ He was thus terminated on April 22, 1994.¹⁶⁵

Soileau sued Guilford for discrimination.¹⁶⁶ The district court granted summary judgment for Guilford, and Soileau appealed.¹⁶⁷ The First Circuit affirmed, holding that Soileau did not meet the definition of disabled under the ADA.¹⁶⁸ The court considered the three elements that must be met, which are “(1) that he had a ‘physical or mental impairment’ that (2) ‘substantially limits’ (3) ‘a major life activity.’”¹⁶⁹ The court conceded that Soileau met the first element because he was diagnosed with dysthymia, but stated that Soileau could not meet the second and third elements.¹⁷⁰

The court discussed whether the ability to get along with others is a major life activity.¹⁷¹ The court first noted that the EEOC regulations do not list this ability as an example of a major life activity.¹⁷² However, the court also noted in a footnote that the EEOC Compliance Manual does

¹⁵⁸ *Id.* at 13-14.

¹⁵⁹ *Id.* at 14.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 13.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.* (citing 42 U.S.C. § 12102(2)(A) (1994)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (citing 29 C.F.R. § 1630.2(i)).

list interacting with others as a major life activity,¹⁷³ but dismissed the manual as “hardly binding.”¹⁷⁴

The court stated that the phrase “‘ability to get along with others’ is remarkably elastic, perhaps so much so as to make it unworkable as a definition” and that “to impose legally enforceable duties on an employer based on such an amorphous concept would be problematic.”¹⁷⁵ The court also noted that the ability to get along with others is different in kind from other major life activity examples used in the EEOC regulations, such as breathing or walking.¹⁷⁶ The court left the door slightly open by stating that “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity”¹⁷⁷

The court concluded that, even assuming that “the ability to get along with others” is a major life activity, Soileau’s claim would fail because he did not provide any evidence of a substantial limitation.¹⁷⁸ This was because Soileau did not have trouble interacting with anyone but his supervisor.¹⁷⁹ The court also said there was no substantial limitation because the limitations that Soileau’s condition imposed, such as wanting to leave bars and stores when they got crowded, were common among the population in general and were “not extraordinary.”¹⁸⁰ The fact that he felt inclined to leave crowded places was not enough to show that his impairment was severe enough to be a substantial limitation.¹⁸¹ Soileau also failed to produce evidence that his condition would be long-term, and thus could not show that it was a substantial limitation.¹⁸² The court then affirmed the grant of summary judgment for Guilford.¹⁸³

¹⁷³ *Id.* at 15 n.2 (citing EEOC Compliance Manual (CCH) § 902.3, ¶ 6883, at 5311 (1995), available at <http://www.eeoc.gov/policy/docs/902cm.html> (last modified Feb. 1, 2000)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 15.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 17.

B. The Major Life Activity Approach

Two circuits have decided that interacting with others is a major life activity: the Ninth Circuit, in *McAlindin v. County of San Diego*,¹⁸⁴ and the Second Circuit, in *Jacques v. DiMarzio, Inc.*¹⁸⁵

In *McAlindin*, plaintiff Richard McAlindin sued the County of San Diego for discrimination in the way he was treated at work, which he alleged was on the basis of his disability.¹⁸⁶ McAlindin began working as a systems analyst for the County’s Housing and Community Development Department in September 1983.¹⁸⁷ He was diagnosed with anxiety disorders, panic disorders, and somatoform disorders,¹⁸⁸ for which he received psychotherapy and medication.¹⁸⁹ In 1989, McAlindin received a provisional promotion that required him to perform new and very stressful duties.¹⁹⁰ As a result, McAlindin sought and was granted leave due to “work stress.”¹⁹¹ McAlindin again took leave for stress in 1992.¹⁹² While he was on leave, he repeatedly requested that the County transfer him to a job that was less stressful as a “reasonable accommodation” required by the ADA.¹⁹³ The County offered to put his name on a transfer list, but refused to give him special treatment to ensure a transfer.¹⁹⁴ When he returned to work he felt that he was treated differently and was given a written warning for sleeping on the job.¹⁹⁵ He also believed that he was treated differently when it came to training opportunities because he was not sent to off-site training like another systems analyst.¹⁹⁶

The district court granted summary judgment for the County on McAlindin’s disability claim, holding that he did not have a disability within the meaning of the ADA, and McAlindin appealed.¹⁹⁷ The Ninth

¹⁸⁴ 192 F.3d 1226 (9th Cir. 1999).

¹⁸⁵ 386 F.3d 192 (2d Cir. 2004).

¹⁸⁶ *McAlindin*, 192 F.3d at 1232.

¹⁸⁷ *Id.* at 1230.

¹⁸⁸ *Id.* “A somatoform disorder is a ‘condition marked by the presence of symptoms suggesting a physical disease but without physical changes or physiological mechanisms that might account for the symptoms.’” *Id.* at 1230 n.1 (quoting J.E. SCHMIDT, 5 ATTORNEY’S DICTIONARY OF MEDICINE AND WORD FINDER at S-206 (1999)). “In addition, there must be evidence, or a strong suggestion, that the symptoms have a psychogenic or psychologic origin.” *Id.* (quoting same).

¹⁸⁹ *Id.* at 1230.

¹⁹⁰ *Id.* at 1231.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1231-32.

¹⁹⁷ *Id.* at 1232.

Circuit reversed, holding that interacting with others is a “major life activity” and that there was a triable issue as to whether McAlindin was substantially limited in that major life activity.¹⁹⁸

The Ninth Circuit accepted the fact that McAlindin was impaired.¹⁹⁹ Next, the court addressed whether McAlindin asserted a major life activity.²⁰⁰ The court cited the EEOC regulations, stating that “major life activities include ‘functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.’”²⁰¹ The court reasoned that “[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity.’”²⁰²

The court cited the First Circuit’s finding that the “ability to get along with others” was too vague to be a major life activity.²⁰³ The court responded by stating that it saw “nothing in the statutory text that makes vagueness the test for determining what is a major life activity.”²⁰⁴ Additionally, the court stated that interaction with others is “no more vague than ‘caring for oneself,’ which has been widely recognized as a major life activity.”²⁰⁵

The court also pointed out that recognizing interacting with others as a major life activity does not mean that a person will be considered to be substantially limited in that activity just because he or she is “cantankerous.”²⁰⁶ Merely having trouble getting along with co-workers is not enough to show that there is a substantial limitation.²⁰⁷ The court held that, to prove substantial limitation of the major life activity of interacting with others, a plaintiff must show that his or her “relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.”²⁰⁸ The court remanded for trial

¹⁹⁸ *Id.* at 1230.

¹⁹⁹ *Id.* at 1233.

²⁰⁰ *Id.*

²⁰¹ *Id.* (quoting 29 C.F.R. § 1630.2(i) (1997)).

²⁰² *Id.* at 1234.

²⁰³ *Id.* (quoting *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997)).

²⁰⁴ *Id.* at 1234.

²⁰⁵ *Id.* at 1235. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998) (citing 45 C.F.R. § 84.3(j)(2)(ii) (1997)); *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998).

²⁰⁶ *McAlindin*, 192 F.3d at 1235.

²⁰⁷ *Id.*

²⁰⁸ *Id.* (internal quotation marks omitted) (quoting EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 3, 5 (Mar. 25, 1997)).

on the issue, among others, of whether McAlindin was substantially limited in the major life activity of interacting with others.²⁰⁹

The other circuit that has found that “interacting with others” is a major life activity is the Second Circuit. In *Jacques v. DiMarzio, Inc.*,²¹⁰ plaintiff Audrey Jacques sued her former employer, DiMarzio, alleging that she was fired because she was “regarded as” disabled.²¹¹ DiMarzio hired Jacques in 1989 to package and assemble guitar components in its factory.²¹² During her tenure she received average to above-average employee evaluations.²¹³ Jacques had psychiatric problems since she was a teenager.²¹⁴ She suffered “severe and major depressions” and was treated for these problems for over forty years.²¹⁵ In 1992, she informed the plant manager, Michael Altilio, that she “was suffering from severe depression and a depression disorder” and that she was taking Prozac.²¹⁶ Altilio was “very understanding” of Jacques’ condition and was supportive of her taking a two-week leave of absence.²¹⁷ Jacques’ supervisor, Betty Capotosto, was not as sympathetic and told Jacques that while she was on leave she should “get crayons and a coloring book and make pot holders.”²¹⁸ Jacques was diagnosed with a chronic form of bi-polar disorder in 1993.²¹⁹ Her psychiatrist stated that her condition “made her vulnerable in social interactions such that she would react in unpredictable ways.”²²⁰ He also recommended that she work in a “structured, well-defined environment . . . with her own semi-closed space such as a cubicle would provide.”²²¹ Towards the end of 1996, Jacques’ working relationship with Altilio and Capotosto became strained and Altilio told Jacques that, because of her “ongoing conflicts with other workers,” he wanted her to work exclusively from her home.²²² Before Altilio and Jacques could agree on the terms of an independent contractor arrangement, Altilio informed Jacques that one of her coworkers, Leandra Mangin, had filed a harassment complaint

²⁰⁹ *Id.* at 1230.

²¹⁰ 386 F.3d 192 (2d Cir. 2004).

²¹¹ *Id.* at 195.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 195-96 n.2.

²²¹ *Id.*

²²² *Id.* at 196.

against Jacques.²²³ Jacques admitted that she teased and ridiculed Mangin, but said that it was “girl-talk and not harassment.”²²⁴ About a week later, Altilio asked the owner of the company, Larry DiMarzio, about the possibility of Jacques working at home and DiMarzio rejected the idea.²²⁵ Instead, he instructed Altilio to terminate Jacques because of her “numerous conflicts with supervisors and . . . coworkers.”²²⁶ Altilio informed Jacques of his conversation with DiMarzio and told her that she was terminated.²²⁷ After failing to get relief before the National Labor Relations Board and the New York State Division of Human Rights, Jacques sought and received a right-to-sue letter from the EEOC and brought suit under the ADA and state law.²²⁸

The district court granted summary judgment for DiMarzio on Jacques’ discrimination claims relating to her ability to take care of herself or work as major life activities, but held there was a “triable issue of fact as to whether DiMarzio regarded Jacques as having ‘severe problems’ ‘on a regular basis’ in her ‘relations with others.’”²²⁹ The jury found for Jacques and awarded her damages.²³⁰ DiMarzio appealed and Jacques cross-appealed from the district court ruling that she did not make out a prima facie case for her first two claims.²³¹ The Second Circuit reversed the jury verdict based on an error in the district court’s jury instructions, but affirmed the district court’s finding that Jacques did not make out a prima facie case for her first two claims.²³²

The court first laid out the elements of a prima facie case under the ADA.²³³ These elements are: “(1) plaintiff’s employer is subject to the ADA; (2) plaintiff was disabled within the meaning of the ADA; (3) plaintiff was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) plaintiff suffered [an] adverse employment action because of her disability.”²³⁴ The court noted that DiMarzio conceded that it was a covered entity under the ADA before moving on to discuss whether Jacques was

²²³ *Id.* at 197.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* (alteration in original).

²²⁷ *Id.*

²²⁸ *Id.* at 198.

²²⁹ *Id.*

²³⁰ *Id.* at 195.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 198.

²³⁴ *Id.* (quoting *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003)).

“disabled.”²³⁵ The court observed that “[i]ndividuals with ‘a physical or mental impairment that substantially limits one or more of the major life activities of such individual’ are disabled within the meaning of the ADA.”²³⁶ The court also noted that an individual could be considered disabled within the meaning of the ADA if there is a record of the disability or if the individual was mistakenly regarded as having an impairment that substantially limits one or more major life activities.²³⁷

DiMarzio conceded that Jacques’ disorder was an impairment for purposes of the ADA.²³⁸ Therefore, the court only needed to consider the issues of “whether ‘interacting with others’ [was] a major life activity protected under the ADA and, if so, what showing is necessary for a plaintiff to be considered ‘substantially limited’ in ‘interacting with others.’”²³⁹ The court then discussed the prior circuit court decisions of *Soileau* and *McAlindin*.²⁴⁰ It declined to follow either approach.²⁴¹ The court noted that “there is a difference between ‘get[ting] along with others’ (the life activity considered in *Soileau*) and ‘interacting with others’ (the life activity considered in *McAlindin*).”²⁴² The court agreed with the First Circuit in *Soileau* that “‘get[ting] along with others’ is an unworkably subjective definition of a ‘major life activity’ under the ADA – in much the same way that ‘perceiving’ (as distinct from merely ‘seeing’ or ‘hearing’) would be an unworkably subjective ‘major life activity.’”²⁴³ The court also agreed with the Ninth Circuit’s “characterization of ‘interacting with others’ as ‘an essential, regular function’ that ‘easily falls within the definition of major life activity.’”²⁴⁴ The court reasoned that “interacting with others” more objectively describes a life activity than does “getting along with others,” which the court said implies “proficiency or success and worsens the problem of subjectivity”²⁴⁵ The court concluded that interacting with others is a major life activity under the ADA, but did not adopt the Ninth Circuit’s test for determining when there is a substantial limitation because it “is unworkable, unbounded, and useless as guidance to employers,

²³⁵ *Id.* at 198 n.6.

²³⁶ *Id.* at 199 (internal quotation marks omitted) (quoting *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 104 (2d Cir. 2003)).

²³⁷ *Id.*

²³⁸ *Id.* at 201.

²³⁹ *Id.*

²⁴⁰ *Id.* at 202 (discussing *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12 (1st Cir. 1997) and *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999)).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* (alteration in original) (quoting *Soileau*, 105 F.3d at 15).

²⁴⁴ *Id.* (quoting *McAlindin*, 192 F.3d at 1234) (internal quotation marks omitted).

²⁴⁵ *Id.*

employees, judges, and juries.”²⁴⁶ Instead the court held that a plaintiff is substantially limited in interacting with others when plaintiff’s “mental or physical impairment severely limits the fundamental ability to communicate with others.”²⁴⁷ The court then stated that this standard is met “when the impairment severely limits the plaintiff’s ability to connect with others, *i.e.*, to initiate contact with other people – at the most basic level of these activities.”²⁴⁸ Conversely, the court provided that the standard is not met when a plaintiff’s “ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful.”²⁴⁹ The court ultimately remanded the case because the district court erred in giving the jury instructions, which prejudiced DiMarzio.²⁵⁰

IV. ANALYSIS

The federal circuits are divided over whether to consider “interacting with others” as a major life activity under the ADA and on how to determine when that activity is substantially limited.²⁵¹ The first step in the analysis will be to show that interacting with others is in fact a major life activity. To do this it is necessary to look at how the Supreme Court has defined the term “major” and how interacting with others fits in with that definition and with other established major life activities.²⁵² After it is shown that interacting with others is a major life activity, the second step is to determine what constitutes a substantial limitation on this major life activity. The Supreme Court has provided guidance on what is meant by “substantial” and the three circuit courts that have addressed whether interacting with others is a major life activity have used three separate tests to determine what constitutes a substantial limitation.²⁵³ Although it seems clear that interacting with others is a major life activity, it is a closer question to determine what constitutes a substantial limitation on that activity.

²⁴⁶ *Id.* See *supra* note 208 and accompanying text.

²⁴⁷ *Jacques*, 386 F.3d at 203.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 204.

²⁵¹ See *supra* Part III.

²⁵² See *infra* Part IV.A.

²⁵³ See *infra* Part IV.B.

A. Interacting with Others as a Major Life Activity

1. It Falls Within the Definition of “Major”

Whether one uses the majority’s definition of “major” in *Bragdon*,²⁵⁴ Chief Justice Rehnquist’s definition in his separate opinion in *Bragdon*,²⁵⁵ or the majority’s definition in *Toyota*,²⁵⁶ interacting with others falls within the definition of “major.”²⁵⁷ Interacting with others is both an “important” and a “significant” activity.²⁵⁸ Human beings are social creatures by nature and it is important for every individual to be able to interact and communicate with others, not only for basic survival needs, but also for entertainment, work, and family purposes. The fact that all individuals must interact and communicate with others at some point, and those that cannot are considered handicapped (such as the mentally retarded), shows the significance of this activity.

Because of the importance and significance of interacting with others, it is necessarily an activity that is of “central importance to daily life” and one that occurs often.²⁵⁹ There are very few people that do not interact with others on a daily basis, even if only on a minimal level. Therefore interacting with others would also satisfy Chief Justice Rehnquist’s definition of “greater in quantity, number, or extent.”²⁶⁰

In light of the foregoing, it is difficult to argue that interacting with others is not “major” within the meaning of “major life activity.” The fact that it is a major life activity is emphasized even more when it is compared to established major life activities, as will be discussed in the next section.

2. Similarity to Other Major Life Activities

Not only does interacting with others fit into the definition of major, but it is also similar to many activities that are considered to be major life activities. Like walking, breathing, and speaking, it is an “essential [and] regular function”²⁶¹ “Interacting with others” can

²⁵⁴ *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); see *supra* note 93 and accompanying text.

²⁵⁵ *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part); see *supra* note 95 and accompanying text.

²⁵⁶ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002); see *supra* notes 104-05 and accompanying text.

²⁵⁷ See Hensel, *supra* note 3, at 1189-90.

²⁵⁸ See *Bragdon*, 524 U.S. at 638.

²⁵⁹ See *Toyota*, 534 U.S. at 197.

²⁶⁰ *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part).

²⁶¹ See *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999).

also be defined as “communicating with others.” “Communicating with others” can in turn be defined in its simplest forms as “speaking” and “hearing,” which are certainly major life activities.²⁶² Some courts have found that communication is a major life activity.²⁶³ In *Soileau*, the First Circuit also indicated that communication could be considered a major life activity, but did not definitively state that it is.²⁶⁴ It is difficult to see how communication is not a major life activity if speaking and hearing are. In this same vein, it is difficult to see how interacting with others is not a major life activity if communication is.

Though interacting with others has been criticized as being too vague,²⁶⁵ it is “no more vague than ‘caring for oneself,’”²⁶⁶ which is recognized as a major life activity.²⁶⁷ Like caring for oneself, interacting with others encompasses many activities.²⁶⁸ Interacting with others includes everything from speaking and listening to expressing emotion and managing conflicts. Of course the fact that other major life activities fall within “interacting with others” is not determinative on the issue of whether it is a major life activity, but it tends to show that it is.

The Second Circuit in *Jacques* characterized “interacting with others” as an “essentially mechanical” function.²⁶⁹ What the court was inferring is that, to interact with others, one does not have to be good at it.²⁷⁰ It does not matter if the person has a bad personality or is not liked by anyone; one only has to participate in the interaction to be “interacting with others.”²⁷¹ This objectivity shows that “interacting with others” is similar to other major life activities, such as speaking or working, which tend to look at ability to participate in the activity not how well one participates. Of course for certain activities, such as seeing, how well one sees goes directly to one’s ability to take part in the activity of seeing.

²⁶² See 29 C.F.R. § 1630.2(i) (2005).

²⁶³ See *Purcell v. Pa. Dep’t of Corr.*, No. CIV.A.95-6720, 1998 WL 10236, at *8 (E.D. Pa. Jan. 9, 1998); see also *Pritchard v. S. Co. Serv.*, No. CV-94-N-0475-5, 1995 WL 338662, at *7 (N.D. Ala. Mar. 31, 1995). But see *Hoeller v. Eaton Corp.*, 149 F.3d 621, 625 (7th Cir. 1998) (affirming a lower court rejection of “communication skills and interpersonal relationships” as major life activities).

²⁶⁴ *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997).

²⁶⁵ See *id.*

²⁶⁶ *McAlindin*, 192 F.3d at 1235.

²⁶⁷ See, e.g., *Bragdon*, 524 U.S. at 638-39; *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998).

²⁶⁸ See *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining caring for oneself to include everything from driving and grooming to feeding oneself and cleaning one’s home).

²⁶⁹ *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004).

²⁷⁰ See *id.* at 202-03.

²⁷¹ See *id.*; see also *infra* notes 279-80 and accompanying text.

This, however, is not the case with regard to interacting with others, as explained above.

Additionally, though courts have dismissed it as only persuasive authority,²⁷² the EEOC Compliance Manual lists “interacting with others” as a major life activity.²⁷³ The Compliance Manual notes that the list of major life activities is not limited to physical activities, rather mental and emotional processes can be major life activities as well.²⁷⁴

3. Why the First, Ninth, and Second Circuits All Have the Right Idea

Even though there is a split between the three circuits that have decided the issue of whether interacting with others is a major life activity, there is language from all three opinions that can be used to support the finding of a major life activity. Despite finding that interacting with others is not a major life activity, the First Circuit in *Soileau* did state that a “narrowly defined concept going to essential attributes of human communication could . . . be understood to be a major life activity.”²⁷⁵ This directly supports the argument in the previous section, that interacting with others is analogous to communicating with others, and is thus a major life activity.

The First Circuit also focused on the language “ability to get along with others” instead of “interacting with others.”²⁷⁶ The First Circuit was correct in rejecting “ability to get along with others” as a major life activity. The Second Circuit in *Jacques* “agree[d] with the First Circuit’s observation that ‘getting along with others’ is an unworkably subjective definition of a ‘major life activity’ under the ADA – in much the same way that ‘perceiving’ (as distinct from merely ‘seeing’ or ‘hearing’) would be an unworkably subjective ‘major life activity.’”²⁷⁷ The Second Circuit then noted that “‘interacting with others’ . . . more objectively describes a life activity than does ‘getting along with others,’ which connotes proficiency or success and worsens the problem of subjectivity

²⁷² See *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 n.2 (1st Cir. 1997); see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (questioning the EEOC’s authority to issue regulations implementing the ADA). But see *Sutton*, 527 U.S. at 513-15 (Breyer, J., dissenting) (arguing that the EEOC has authority to issue regulations implementing the ADA).

²⁷³ See EEOC Compliance Manual, *supra* note 173, § 902.3(b).

²⁷⁴ *Id.*

²⁷⁵ *Soileau*, 105 F.3d at 15.

²⁷⁶ *Id.*

²⁷⁷ *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 202 (1st Cir. 2004) (citing *Soileau*, 105 F.3d at 15).

...²⁷⁸ There is a distinct difference between simply interacting with others, whether one is good or bad at it (an “essentially mechanical” function),²⁷⁹ and getting along with others, which implies that one is liked by all and never has a conflict with anyone (an “evaluative concept”).²⁸⁰ It is clear that such an activity cannot be considered a major life activity. Therefore, both the First and Second Circuits are correct in rejecting “ability to get along with others” as a major life activity.

It is possible that, if the issue is brought before the First Circuit in a more direct fashion, namely specifically claiming the major life activity of “interacting with others,” it would find that this is a major life activity. This can be surmised from the First Circuit’s statement that communication could be a major life activity, and the fact that the Second Circuit, which found interacting with others as a major life activity, agreed with the First Circuit’s rejection of the ability to get along with others as a major life activity.

The main point on which the Second and Ninth Circuits agree is that interacting with others is a major life activity.²⁸¹ The disagreement between these two circuits is over what constitutes a substantial limitation on this major life activity, which will be discussed in the next section.²⁸²

All three circuits are on the right track. First, the First and Second Circuits rejected the “ability to get along with others” as a major life activity,²⁸³ which is the correct approach. Second, the Second and Ninth Circuits held that “interacting with others” is a major life activity,²⁸⁴ which is also the correct approach. Lastly, the First Circuit recognized that communication could be a major life activity,²⁸⁵ which leaves the door open for recognizing interacting with others as a major life activity.

B. The Correct Test for Substantial Limitation

Now that it has been shown that interacting with others is a major life activity, the next essential step is to determine what constitutes a substantial limitation on that major life activity. Three different tests have been used by the three circuits – the First, Ninth, and Second – that

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 203; *see supra* notes 269-71 and accompanying text.

²⁸⁰ *Jacques*, 386 F.3d at 202-03.

²⁸¹ *See id.*; *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999).

²⁸² *See infra* Part IV.B.

²⁸³ *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997); *Jacques*, 386 F.3d at 202.

²⁸⁴ *Jacques*, 386 F.3d at 201-02; *McAlindin*, 192 F.3d at 1234.

²⁸⁵ *Soileau*, 105 F.3d at 15.

have addressed whether interacting with others is a major life activity.²⁸⁶ The Second Circuit’s test is the most workable and better test of the three. This is because it addresses the core aspect of interacting with others – one’s ability to communicate with others.²⁸⁷

1. Possibilities

There are two possible models for the test to determine when the major life activity of interacting with others is substantially limited. These two possibilities are the two tests that have actually been applied to the recognized major life activity of interacting with others.²⁸⁸ Other circuit courts have addressed the issue of what will be considered a substantial limitation on the major life activity of interacting with others by assuming, without deciding, that it is one. However, these other courts have merely cited the test set out by the Ninth Circuit in *McAlindin*,²⁸⁹ except for the First Circuit, which used its own approach in deciding *Soileau* prior to *McAlindin*.²⁹⁰

a. The First Circuit’s Test: *Soileau*

In determining whether the plaintiff was substantially limited in the major life activity of interacting with others, the First Circuit used the EEOC definition of “substantial limitation,” which is essentially whether the average person in the general population would be significantly limited in performing the task.²⁹¹ The First Circuit also considered the

²⁸⁶ See *infra* Part IV.B.1.

²⁸⁷ See *infra* Part IV.B.2.

²⁸⁸ Because the Ninth and Second Circuits are the only two circuits to have recognized the major life activity of “interacting with others,” they are the only two courts that have genuinely addressed the issue of substantial limitation, as opposed to concluding that “even if” interacting with others were a major life activity the requirement of substantial limitation is not met. See *infra* note 289 and accompanying text.

²⁸⁹ See *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (concluding that the plaintiff could not show that his “relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary”) (internal quotation marks omitted) (quoting *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999)); *Heisler v. Metro. Council*, 339 F.3d 622, 628-29 (8th Cir. 2003) (concluding that plaintiff could not show that her impairment “caused her to experience ‘high levels of hostility, social withdrawal, or failure to communicate when necessary’”) (citing *McAlindin*, 192 F.3d at 1235); *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 276 (4th Cir. 2004) (concluding that plaintiff “fail[ed] to demonstrate that her problems with social interaction over the course of her employment were ‘sufficiently severe’ to establish a substantial limitation”) (referring to *McAlindin*, 192 F.3d at 1235).

²⁹⁰ Compare *Soileau*, 105 F.3d 12 (1st Cir. 1997), with *McAlindin*, 192 F.3d 1226 (9th Cir. 1999). See *infra* Part IV.B.1.a.

²⁹¹ *Soileau*, 105 F.3d at 15 (quoting 29 C.F.R. § 1630.2(j)(1) (2005)); see *supra* note 108 and accompanying text.

factors suggested by the EEOC regulations,²⁹² which include “the nature and severity” of the impairment,²⁹³ the “duration” of the impairment,²⁹⁴ and the “long-term impact” of the impairment.²⁹⁵

b. The Ninth Circuit’s Test: McAlindin

The Ninth Circuit also used EEOC guidance as the basis for its approach for determining whether the major life activity of interacting with others is substantially limited. The court first noted that “[r]ecognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity.”²⁹⁶ The court then provided that “[m]ere trouble getting along with coworkers is not sufficient to show a substantial limitation.”²⁹⁷ Using the EEOC regulations, the court recognized that “the limitation must be severe,” meaning that it must be substantial when “compared to the ability of ‘the average person in the general population.’”²⁹⁸ The court also used EEOC guidance in stating its holding: “We hold that a plaintiff must show that his ‘relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.’”²⁹⁹

c. The Second Circuit’s Test: Jacques

The Second Circuit spent much of its analysis of the substantial limitation issue explaining why the Ninth Circuit’s approach in *McAlindin* was incorrect.³⁰⁰ The court then stated its holding: “We hold that a plaintiff is ‘substantially limited’ in ‘interacting with others’ when the mental or physical impairment severely limits the fundamental ability to communicate with others.”³⁰¹ The court elaborated by stating when the test is satisfied and when it is not.³⁰² There is a substantial limitation “when the impairment severely limits the plaintiff’s ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people – at the most basic level of these

²⁹² *Soileau*, 105 F.3d at 15-16.

²⁹³ 29 C.F.R. § 1630.2(j)(2)(i) (2005).

²⁹⁴ *Id.* § 1630.2(j)(2)(ii).

²⁹⁵ *Id.* § 1630.2(j)(2)(iii).

²⁹⁶ *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

²⁹⁷ *Id.*

²⁹⁸ *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(i) and (j)(2)(i)).

²⁹⁹ *Id.* (quoting *EEOC on Psychiatric Disabilities* at 5).

³⁰⁰ *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 202-03 (1st Cir. 2004).

³⁰¹ *Id.* at 203.

³⁰² *Id.*

activities.”³⁰³ There is not a substantial limitation when “a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful.”³⁰⁴

2. Why the Second Circuit Is Correct

The First Circuit’s approach is too generalized. The test is not specific and, like the EEOC regulations from which it is derived, can be interpreted broadly. Some commentators criticized this approach by saying that, even if interacting with others is recognized as a major life activity, satisfying the standard for a substantial limitation is so difficult that it is almost insurmountable.³⁰⁵

The Ninth Circuit’s approach is “unworkable, unbounded, and useless as guidance” for making the determination of whether the major life activity of interacting with others is substantially limited.³⁰⁶ Requiring a showing of “severe problems”³⁰⁷ and “consistently high levels of hostility”³⁰⁸ misplaces the inquiry.³⁰⁹ Such requirements seem akin to determining whether an individual gets along with others instead of whether they can interact with others, as discussed above. Argumentativeness and hostility are desirable characteristics in many employment contexts,³¹⁰ the practice of law being one of them. Furthermore, requiring consistently high levels of hostility encourages a “cantankerous” person to become even more difficult and bad tempered.³¹¹ An employer that has an employee who is extremely crass and harasses other employees would have to decide to either risk being sued by the employee for being fired or risk being sued by others who experience the hostile work environment that the employee’s behavior creates.³¹² “Social withdrawal”³¹³ and “failure to communicate when necessary”³¹⁴ seem to be more appropriate showings to require. However, “social withdrawal” has many different meanings, and not all of these meanings would be a substantial limitation on the ability to

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See Hensel, *supra* note 3, at 1193 (advocating the *McAlindin* test as the better approach, but before *Jacques* was decided).

³⁰⁶ *Jacques*, 386 F.3d at 202.

³⁰⁷ *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

³⁰⁸ *Id.*

³⁰⁹ *Jacques*, 386 F.3d at 203.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999).

³¹⁴ *Id.*

interact with others.³¹⁵ Some individuals prefer solitude and choose to spend time alone, but this does not make them substantially limited in interacting with others.³¹⁶ “Failure to communicate when necessary” appears to be the only appropriate requirement of the Ninth Circuit’s test. As with the Second Circuit’s test, this element goes to the core of “interacting with others.”

The Second Circuit’s test is the best approach because, as mentioned previously, it goes to the core of “interacting with others,” which is the ability to communicate with others. The requirement of showing a limitation on the “fundamental ability to communicate”³¹⁷ gets directly at the essence of interacting with others. The court’s elaboration on what does and does not satisfy the standard performs two functions. First, it makes the test even clearer and easier to apply by further defining communication as the basic ability to “initiate contact with other people and respond to them.”³¹⁸ Second, it shows what is included in the activity of interacting with others besides the core concept of communication with others, i.e. the ability to “go among other people.”³¹⁹ This test also sets the clear standard that “inappropriate, ineffective, or unsuccessful” communication is not enough to satisfy the test for a substantial limitation.³²⁰ In sum, the Second Circuit test in *Jacques* is the best approach to take because it identifies communication as the core concept of interacting with others, but also recognizes that interacting with others encompasses more than communication, such as relating with and being among other people.

V. CONCLUSION

The federal circuit courts are divided over whether interacting with others is a major life activity. Currently, one circuit, the First Circuit, holds that it is not a major life activity, and two circuits, the Second and Ninth Circuits, hold that it is a major life activity.³²¹ This article argues that the Ninth and Second Circuits are correct in finding that “interacting with others” is a major life activity. Interacting with others falls within the definition of “major,” as defined by the Supreme Court, because it is

³¹⁵ *Jacques*, 386 F.3d at 203 n.9.

³¹⁶ *See id.*

³¹⁷ *Id.* at 203.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *See supra* Part III.

a significant activity that has “central importance in daily life.”³²² It is also similar to other major life activities.³²³

This article also argues that the correct test to determine when the activity of interacting with others is substantially limited is when the fundamental ability to communicate with others – initiating contact with others, responding to them, and going among them – is severely limited.³²⁴ This is the correct test because it recognizes the two central aspects of interacting with others: communicating with people and being among them.³²⁵

³²² Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002); see Bragdon v. Abbott, 524 U.S. 624, 638 (1998); see also *supra* Part IV.A.1.

³²³ See *supra* Part IV.A.2.

³²⁴ Jacques v. DiMarzio, Inc., 386 F.3d 192, 203 (1st Cir. 2004).

³²⁵ See *supra* Part IV.B.2.